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CURRENT TOPICS.

In *Dexter v. Cranston*, decided by the Supreme Court of Michigan on the 8th ult., the affidavit of publication of a notice of sale showed the notice to have been given in a newspaper "published and circulating in the county" while the statute required such notices to appear in a newspaper "printed in the county." The court held the affidavit sufficient saying: "It is true the statute requires the notice to be published in a 'newspaper, if there be one printed in the same county,' but this means something more that the mere printing At the present day the composition and press-work, or in other words the printing, may be done in one county, while the publication and circulation may be exclusively in another, if not indeed sometimes in another State. The publication of a notice in a newspaper printed in a county in which it was not published or circulated would not be a compliance with the statute, no matter how literally it might be within the words thereof." We recollect that about two years ago many inquiries were addressed to us in reference to a statement in the daily press that it had been decided by an associate justice of the Supreme Court of the United States, on circuit, that a notice published in a paper, a part of which was printed in another county, as in the case of what are known as "patent outsides," was not sufficient, because a paper was to be deemed as published from the office at which it was first printed, no matter where it was sent for circulation. See 4 Cent. L. J. 529. We were never able to find that decision which it is safe to say for the reasons then given in our comments on the matter, was never made.

In *Leach v. French* lately decided by the Supreme Court of Maine, it was held that the owner is liable for the treatment and keep of a horse hired to another and which becomes sick or disabled while in his possession. The defendant let a horse to one D which became sick and diseased during the term, and D left him with the plaintiff for care and cure. In an action by the latter for his services BARROWS J., said: "Upon whom, then, as between D and the defendant, should the expense of keeping and caring for the defendant's horse which 'became diseased and sick while in D hands' fall? Up to the time when he fell sick it was D's business to furnish him at his own proper expense with 'meat for his work.' But how was it when he could no longer lawfully use him under his contract? Unless the horse was disabled through some fault or neglect of D, the owner is the one who bears the burdens occasioned by his failure to perform the work for which he was hired, and among them would be the expense of the care and cure of the animal—an expense which enures directly to his benefit. There would be good reason for holding that in such a case the hirer is *ex necessitate*, the agent of the owner to procure such reasonable and necessary sustenance and farrier's attendance as might be required until the animal could be got home; for, while the hirer is not responsible for any mistakes which a regular farrier whom he calls in may make in the treatment of the animal, still if instead of applying to a farrier, he undertakes to prescribe for the beast himself, and by his unskilfulness does it a mischief, he assumes a new degree of responsibility and becomes liable to the owner for the result of any want of such care as a man of ordinary prudence would take of his own horse. Deane v. Keate, 3 Camp. 4." "If a man hires a horse," remarks Lumpkin, J., in Mayor of Columbus v. Howard, 6 Ga. 213, "he is bound to ride it moderately and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food." Thus doing, if the animal falls sick or lame, without any want of ordinary care on the part of the hirer, he is not responsible to the owner for the consequences. The owner of the animal must bear them. But if the horse falls sick or becomes exhausted, the hirer is bound not to use it. And if he does pursue his journey and use it when reasonable care and attention would forbid, he would make himself responsible to to the owner for that act. Bray v. Mayne, Gow. 1, 5 E. C. L. R. 427. On the other hand, one who lets a horse impliedly under-

takes that the animal shall be capable of performing the journey for which he is let; and if, without the fault of the hirer, he becomes disabled by lameness or sickness, so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services. Harrington v. Snyder, 3 Barb. 380.

In *Ferry v. Williams*, which we find reported in the advance sheets of 12 Vroom, the relator, a citizen of the town of Orange, desiring to ascertain whether the provisions of its charter in regard to licensing saloons were being observed, applied to the collector of taxes for an inspection of the letters on which the existing licenses had been granted. The collector refused his request, and the common council, on appeal to them, approved of this refusal, and instructed the collector to persist in his refusal. The relator then applied to the Supreme Court for a *mandamus* to compel the collector to allow the inspection, asserting no interest to be subserved by an inspection of the letters, except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells. The court granted a *mandamus*. In England, the occasions which have generally required the exercise of the power of the court to enforce inspection of public documents, have been those where a party has sought evidence for the prosecution or defense of his rights in pending litigation. In such cases, when the custodian of the documents was a party in the case, the court usually intervened by rule, otherwise by *mandamus*. But the existence of a suit was not a *sine qua non* for the exertion of the power. In Rex v. Lucas, 10 East 235 a *mandamus* was sought to compel the steward of the manor to permit one claiming certain copyhold lands within the manor to inspect the court rolls and takes copies. The lord, claiming himself to be the owner of the lands, resisted on the ground that there was no cause depending; but the Court of King's Bench granted the writ, notwithstanding the opinion before expressed in Rex v. Allgood, 7 T. R. 742, Lord Ellenborough saying: "I do not know why there should he any cause depending in order to found an application of this sort. This is not the impertinent intrusion of a stranger, but the application of one who is clearly entitled to the copyhold, unless there be a conveyance of it by those under whom he claims; he may, therefore, well require to see whether there appears upon the rolls to be any such conveyance." So in Rex v. Tower, 4 M. & S. 162, on a controversy, but without suit, between a tenant of the manor and the lord, as to cutting underwood, the court granted a *mandamus* to inspect the court rolls so far as related to the subject. Likewise in Rex v. Justices of Leicester, 4 B. & C. 891, a *mandamus* was granted that certain ratepayers be allowed to inspect and take copies of the proceedings and documents relating to the parish rates, although no suit was pending; and while this case is disapproved in Rex v. Vestrymen of St. Marylebone, 5 A. & E. 268, and overruled in Rex v. Justice of Staffordshire, 6 A. & E. 84, yet in neither case is it suggssted that it was erroneous because no action had been brought. The disapprobation turns upon the principle that the ratepayers had no interest to be subserved by the inspeetion, since no information to be obtained from the documents could aid them in enforcement or protection of any lawful claim, Lord Denman saying, in the last case cited, that the subject-matter was not one which the ratepayer could bring before the court as a litigant, and hence there was not that direct and tangible interest which is necessary to bring persons within the rule on which the court acts in granting inspection of public documents. In Rex v. Merchant Tailors' Co., 2 B. & Ad. 115, although a *mandamus* was refused to members of the company seeking an inspection of *all* the records, books, papers and muniments of the company, because of the generality of the application, it was conceded by all the judges that if the application had been limited to some legitimate and particular purpose in respect of which the examination became necessary, it would have been allowed, and that there was no rule that to warrant an order to inspect corporation documents, there must actually have been a suit instituted. It seems, therefore, to be sufficient if the person seeking inspection has such an iuterest in a specific controversy as will enable him to maintain or defend an action, for which the public

documents will furnish competent evidence or necessary information.

Nor is it essential as was held in *Ferry v. Williams*, that his interest should be private, capable of sustaining a suit or defense on his own personal behalf. It will justify his demand for inspection, if he may act in such suit as a representative of a common or public right. The cases in England, in which a private subject has secured inspection of public or *quasi* public documents on the ground of being such a representative, are comparatively rare, because of the prevalence of the rule that the civil remedy for wrongs by which no private rights were peculiarly affected was usually in the name of the attorney general acting on behalf of the public. But whenever the subject was, by reason of his relation to the common interest, permitted to litigate for its protection, the right of inspection was fully secured to him. Thus, in Rex v. Shelly, 3 T. R. 141, where some of the burgage tenants were testing by *quo warranto* the right of the defendant to be a burgess, a full inspection of the court rolls, not limited to the evidence of their own titles, was granted them. In Rex v. Babb, 3 T. R. 579, on an information by three aldermen to inquire into the right of Woolmer to be mayor of Great Grimsby, the relators had a rule for the inspection and copies of all the public books, records and papers of the borough of Great Grimsby regarding the subject in dispute. And in the cases of Rex v. Justices of Leicester, Rex v. Marylebone, Rex v. Justices of Staffordshire, and Rex v. Merchant Tailors' Co., already cited, the applicants for inspection had no other interest in the matter involved than such as they shared in common with all the ratepayers of the parish or members of the corporation, but that was not even suggested as a ground for refusing the *mandamus*. And indeed, upon the reason of the thing, if inspection of public documents will be granted to a private individual when he is seeking merely the furtherance of his own private ends, *a fortiori* should it be accorded to him when he is aiming at the accomplishment of a public purpose, as to which the courts will assist his design through a suit instituted by him in the public behalf.

CONCERNING THE DEGREES OF NEGLIGENCE AS APPLIED TO THE CASE OF COMMON CARRIERS.—II.

In Wright v. Gaff, 6 Ind. 416, the defendant had agreed to tow a flat boat, the owners of the latter agreeing that it should be done at their risk. It being sunk by the negligence of the defendant in towing at an improper speed, the court held that this was "gross negligence" and that he was therefore liable, and this ruling was affirmed in Indianapolis etc., R. Co. v. Reming, 13 Ind. 518, subsequently decided. In Indiana Cent. R. Co. v. Mundy, 21 Ind. 48 the indorsement on a free pass that the person receiving it agreed to assume all risk of personal injury and loss or damage while using it, was held not to exempt the company from the consequences of gross negligence. "Ordinary negligence" was also spoken of in the same way in Indianapolis etc. R. Co.v Allen, 31 Ind. 394. But in Michigan Southern R. Co. v. Heaton, 37 Ind. 448, the court ruled that a carrier could no more stipulate for exemption from a slight degree of negligence than he could for gross negligence, and in Ohio etc., R. Co. v. Selby, 47 Ind. 483, decided in 1874, the question received a thorough examination; the three cases first cited in this paragraph were overruled, the court remarking that the very decided tendency of modern decisions was to disregard the distinction between different kinds or degrees of negligence. In Illinois Cent. R. Co. v. Adams, 42 Ill. 474, an action against a railroad for injuries to live stock the court in discusing the evidence said: "If then, it was gross negligence in the conductor of the train carrying these hogs, in refusing to apply water to them when requested at Bloomington or at Normal, at which latter place water was abundant and convenient, *the company could not contract against that*," and the same view is taken in Adams Express Co. v. Haynes, 42 Ill. 89. Both these cases rest on the earlier one of Illinois Cent. R. Co. v. Morrison, 19 Ill. 136, in which the question of the power of carriers of live stock to restrict their liability coming before the Supreme Court of Illinois for the first time, Breese J., laid down the rule in that State thus: "Railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, they still remaining liable for

gross negligence or wilful misfeasance against which good morals and public policy forbid that they should be permitted to stipulate." In New York there are several adjudications in which the distinction, in actions against common carriers, is made. Thus in French v. Buffalo &c. R. Co; 4 Keyes 114; *s. c.*, 2 Abb. App. 196 it was said: "This is the recognized and accepted distinction between the different degrees of negligence, a distinction which is often found but of little practicable importance when dealt with by a jury on the trial of a cause, but one which the courts are bound to regard in the determination and application of the rules of law," and similar views have been expressed in other cases.[1]

The cases in which the distinction has been rejected are too numerous to set out in this place, and therefore it will be sufficient to cite the adjudications on the question in the Supreme Court of the United States, in which the reasons for the rule there adopted are fully shown. It is said by the Supreme Court of the United States in Philadelphia R. Co. v. King, 16 How. 468 (1850): "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases, may well deserve the epithet gross." "The theory that there are three degrees of negligence described and known as slight, ordinary and gross," says Mr. Justice Curtis, in The New World v. King, 16 How. 472 (1853), "has been introduced into the common law by some of the commentators of the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances to whose influence the court has been forced to yield until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation." But the question has been put conclusively at rest in that court by Railroad Co. v. Lockwood, 17 Wall. 357 (1873) in delivering the opinion in which case Mr. Justice Bradley referred to the discussion in this language: "We have already reverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, that of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence, and if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In such case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French civil code undertook to abolish these distinctions by enacting that every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.' Touillier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice. In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure

[1] Consult Wells v. New York Cent. R. Co., 24 N. Y. 181; Perkins v. New York Cent. R. Co., 24 N. Y. 196; Smith v. New York Cent. R. Co., 24 N. Y. 222; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Poucher v. New York Cent. R. Co., 49 N. Y. 263.

to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary."

These authoritative utterances should effectually settle the question. The degrees of negligence then can be spoken of no longer in the case of common carriers. The absence of care according to circumstances is sufficient to render them liable for breaches of duty and the term "gross," if used at all can only be used as a "vituperative epithet." In this sense it may properly be used in cases involving the question of contributory negligence, and in cases where the question of exemplary damages may arise for determination. But in no other.

PERSONAL INJURIES — NEW TRIAL FOR INSUFFICIENCY OF DAMAGES.

PHILLIPS v. SOUTHWESTERN R. CO.

English Court of Appeal, July, 1879.

A plaintiff complaining of a personal injury is entitled to compensation for the pain undergone, the effects on the health according to the degree and probable duration, the incidental expenses and the pecuniary loss, and if it appear that a jury must have omitted to take into account any of these heads of damages, and that the verdict is, under the circumstances, unreasonably small, it is competent to a court to order a new trial at the instance of the plaintiff, although there be no misdirection by the judge, nor mistake or misconduct on the part of the jury.

This was an appeal by the defendant company from a decision of the Queen's Bench Division, reported 9 Cent. L. J. 125.

The case was shortly as follows: An action was brought by the plaintiff, a physician, for injuries sustained when travelling on the defendant's railway. It appeared at the trial that he had sustained such severe personal injuries as to injure his health irreparably, and render his life a burden to him, and that he had been incapacitated from carrying on his profession, and would probably never recover. It was proved that the medical and other expenses had amounted to £1,000, and further expenses would probably be for a long time necessary; that the plaintiff's professional income had been £5,000 a year, and that for the sixteen months between the accident and the trial he had been incapacitated from earning anything. The jury gave £7,000 damages. A rule *nisi* for a new trial had been obtained on the ground that the damages were inadequate, against which the railway company showed cause, contending that where an action was for unliquidated damages the court could not interfere on the ground that the damages were inadequate, unless there had been a misdirection by the judges or some misconduct or mistake in the calculation of figures by the jury.

In the court below, Cockburn, C. J., and Lopez, J., held that, where on the facts it appeared that the jury could not have taken into account some of the elements properly involved in the plaintiff's claim, the court should grant a new trial on the ground of inadequacy of damages. They were of opinion that on the facts as proved this must have been the case, and therefore made the rule absolute.

On the appeal, *Ballantine*, Sergt., and *Dugdale*, for appellants, referred to Forsdike and Wife v. Stone, 18 T. T, Rep. (N. S.) 722; L. R., 3 C. P. 607; Rowley v. London & Northwestern Railway Co., 29 L. T. Rep. (N. S.) 180; L. R., 8 Ex. 221; Falvey v. Stanford, 31 L. T. Rep. (N. S.) 677; L. R. 10 Q. B. 54; Kelly v. Sherlock, L. R., 1 Q. B. 686; Armytage, v. Haley, 4 Q. B. 917; Hayward v. Newton, 2 Str. 940: Rendall v. Hayward, 5 Bing. N. C. 424; Mayne on Damages, 447.

The Attorney-General (*Sir J. Holker*), *Pope*, *Q. C.*, and *A. L. Smith*, for plaintiff, relied upon Blake v. Midland Railway Co., 18 Q. B. 93, 111; Pym v. Great Northern Railway Co., 2 B. & S. 768 and 769.

JAMES, L. J.

In this case we are of opinion that we can not on any of the points differ from the judgment which the Queen's Bench Division have arrived at in this matter. With regard to the first point, which seems to me to be a very important one—that is, as regards dissenting from the verdict of a jury upon a matter which, generally speaking, is considered to be within their province, namely, the amount of damages—we agree with what has been said in the Queen's Bench Division; and in saying this we agree also that really the judges have no right to differ from or overrule the verdict of the jury because they take a different view, and merely because they differ. The judges may think that if they had been the jury they would have given a little more or would have given a little less. Still, there is this rule, that the verdicts of juries in all these cases are subject, and must, for the sake of justice, be subject to the careful supervision of a court of first instance, and if neecssary, of a court of appeal, in this way; that if in the judgment of the court the damages given are unreasonably large, or if they are unreasonably small, then the court is bound to act upon the conclusion thus arrived at, and must send

the case again to be tried. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small; and for the reasons given by the Lord Chief Justice, pointing out certain facts which the jury could not have taken into consideration, I am of opinion, and I believe my colleagues are also of opinion, that the damages given were unreasonably small, though to what extent they fell short of what would be reasonable and proper we have no business to say, as that would direct another jury as to what amount they ought to give. So much upon that point. Then, if our decision remains unreversed by the House of Lords, where we understand this matter is to go, and the case goes before another jury, it may be important to see whether the direction of Field, J., was right. The Queen's Bench Division came to the conclusion that they could see no error or misdirection whatever in the summing up of Field J.; and it appears to me that the argument of the attorney-general and Mr. Pope would not go to say that there was a misdirection, but rather that there was an ambiguity in the expressions of the learned judge, which would have the effect of misdirection, and that sufficient attention was not drawn to the distinction between personal injury and pecuniary damages. The next point was with regard to the income supposed to be enjoyed by the plaintiff through his wife; and it was argued that that was not withdrawn sufficiently—not absolutely as it ought to have been—from the consideration of the jury. Now, on the first point, taking the whole of the summing-up together, it seems to me that the learned judge tells the jury, almost in the words used by the attorney-general, that, assuming the plaintiff is to live, they must not take that fact into consideration in an off-hand manner. He says: "Of course, as my brother Ballantine has observed, an accident might have taken him off; death might have seized him within a year. On the other hand, he might have lived for the next twenty years, and many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. There is not the same difficulty in a case like this. That does not come into account. I am only giving it by way of illustration of what must pass through your minds for the purpose of seeing what portion of this sum per annum you ought to consider would be the amount on which you can fairly base your calculation for the sum to be given." That is to say, they were to consider what his income would probably be; how long that income would last; and they were to take into consideration all the other contingencies which a practice was liable to. Again he says: "After all, the damages a man is entitled to are to be in principle the consequences of the wrongful act. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would be likely to earn on the average of years." Nothing could be put more favorably for the plaintiff than that was put by Field, J. With regard to the way in which the learned judge dealt with the second point, without saying that his expressions are capable of being treated as a misdirection by reason of a possible ambiguity, we agree in the view taken by the Queen's Bench Division, and therefore the matter will stand exactly as it was lett by that Division so far as we are concerned.

BRETT and COTTON, L. JJ., concurred.

POWER OF MUNICIPALITY TO VOTE MONEY FOR ENTERTAINMENTS—INJUNCTION.

AUSTIN v. COGGESHALL.

Supreme Court of Rhode Island, April, 1879.

1. MUNICIPAL CORPORATION—POWER TO DEVOTE PUBLIC FUNDS TO ENTERTAIN VISITORS—INJUNCTION. — A clause in a city charter provided that "nothing in this charter shall be construed as giving power to vote money for any object except for the regular, ordinary and usual expenses of the city." This clause being in force the city council resolved to give a ball and banquet in honor of certain strangers. The resolution of the council and the preparations for the ball were well known, and September 9, 1878, the ball took place. September 27, 1878, certain tax-payers of the city prayed that the city treasurer might be perpetually enjoined from paying the bills incurred. *Held*, that the injunction must issue.

2. ESTOPPEL — LIABILITY OF ONE CONTRACTING WITH A MUNICIPAL CORPORATION.—Neither the fact that the city authorities had without objection given a similar ball in 1875, nor that the complainant tax-payers had waited till the expense had been incurred before filing their bill of complaint, nor that the caterers had acted in good faith and must suffer if the injunction issued, could be urged by the respondent treasurer against the prayer of the bill, as one who contracts with a municipal corporation is bound at his own peril to know the limits of municipal authority.

Bill in equity for an injunction.

DURFEE, C. J., delivered the opinion of the court:

In the summer of 1878 the Bellerophon, under the command of Vice-Admiral Inglefield, with two other British ships of war, visited Newport Harbor, remaining from August 28 until after September 9. On their arrival the city council of Newport appointed a committee to arrange an entertainment for the officers; accordingly a ball and banquet were given at the Ocean House, September 9, at a cost about $2,950, invitations being extended to some twelve hundred citizens as well as the officers. It is alleged, by way of apology for the city council, that on a similar visit in 1875 a similar entertainment was given without objection from anybody, and that the presence of the vessels drew crowds of visitors to the city to the considerable emolument of the citizens. The resolution to give the entertainment was so notorious that it must be presumed to have been known at once to the complainants, who were residents in Newport, and who nevertheless took no legal steps to prevent the entertainment. The answer alleges that the committee of arrangements acted in good faith,

believing their action was legal. It also alleges, what appears to have been the fact, that the entertainment was provided on the credit of the city by persons who had no connection with the city government and who honestly believed that the committee had power to contract for the city. These persons remain unpaid. This suit was commenced September 27, 1878, by certain tax-payers of the city of Newport. The bill prays for an injunction to restrain the defendant, who is the city treasurer of the city of Newport, from paying the cost of the entertainment out of the treasury, it being anticipated that an order for the payment may be given by the city council.

The bill sets forth a clause of the charter of the city of Newport, which declares that nothing in the charter shall be construed "as giving power to vote money for any object, except for the regular ordinary and usual expenses of the city."

The defendant concedes that the city council had no authority to contract or to empower the city to contract for the entertainment in the name of the city, and rests his defense solely on the ground that the complainants have forfeited all claim to equitable relief by their laches in waiting until after the entertainment had been given before bringing the suit. He cites in support of this position the case of Tash v. Adams, 10 Cush. 252, in which the Supreme Judicial Court of Massachusetts refused to enjoin the payment of money illegally appropriated for the celebration of the second centennial anniversary of the settlement of a Massachusetts town, because of such laches on the part of those by whom the injunction was asked. "With a full knowledge of the vote of the town and the proceedings of the committee," says Mr. Justice Bigelow, in delivering judgment, "they, *i. e.* the petitioners, permitted contracts to be made, and expenditures to be incurred, not only by the committee, but by third parties, who acted in good faith, relying on the credit of the town. They took no measures to enforce their rights until after the celebration had taken place, and innocent parties had come under liabilities, which they would not have assumed if the petitioners had seasonably sought redress for the impending grievance. To issue an injunction restraining the payment of the bills thus incurred would be manifestly most inequitable;" and see Fuller v. Melrose, 1 Allen, 166, in which Tash v. Adams is affirmed.

We do not see any material distinction between Tash v. Adams and the case at bar, and therefore, if Tash v. Adams is good authority, the bill in the case at bar must be dismissed. We do not think it can be followed as authority. The object of this suit is to restrain the defendant as a city treasurer from making an illegal payment out of the treasury. The defendant admits the illegality of the payment, and therefore he virtually admits that the complainants are only seeking to have him enjoined from doing what it is his duty to refrain from doing without injunction. His only objection to the injunction is, that the complainants have forfeited their claim to it by their laches. But toward whom have they been guilty of laches? Not toward the defendant, and not toward the city, for which the defendant acts. The injunction will not hurt the defendant. It will benefit the city. The laches, if laches they can be called, are laches toward certain persons, not parties to the suit, having an illegal claim on the treasury. The defendant is seeking to protect them at the expense of the treasury, when it is his duty to protect the treasury against them. For the court to refuse to enjoin such a dereliction of official duty looks very much like conniving at it. The defense would be more meritorious if the persons in whose behalf it is interposed had any claim on the city for value received. But they have none. The city neither danced at the ball nor feasted at the banquet. It got nothing substantial out of them. If the city's money goes to pay for them, it will go to pay for what the city neither bargained for nor enjoyed. And again, the defense would appeal more forcibly to the consideration of the court if the complainants had taken any part in procuring the entertainment to be given. But they did not. Their only fault is the passive one of having delayed their suit. And, in this connection, it is to be borne in mind that the complainants, though they sue alone do not sue for themselves alone, but for themselves in common with all other Newport tax-payers, and though they may have been guilty of dilatoriness, there are doubtless numerous other tax-payers who by reason of absence, sickness, infancy, imbecility, are entirely innocent in that regard. The defendant represents the entire city, these innocent tax-payers included. It is his duty to defend, not betray, their interests, and the court ought not to countenance a defense which amounts to a betrayal of them.

The case may be considered in still another light. It is of the essence of the defense that the persons who furnished the entertainment acted in good faith, being ignorant that the city was incapable of contracting for it. If they knew the city was incapable of contracting for it, the defense falls to the ground. But was it not their duty to know it? And can the court entertain the supposition that they did not know it? It is well settled that a municipal corporation, when sued directly on a contract which it is incapable of making, cannot be estopped from taking advantage of its incapacity because the party suing has acted on the contract in good faith, supposing it to be legal, for the reason that any person who contracts with such a corporation, which is a creature of public law, is bound at his own peril to know the extent of its capacity. Dillon Municip. Corp. § 381; Weismer v. Village of Douglas, 64 N. Y. 91; Thomas v. City of Richmond, 12 Wall. 349; Town of South Ottawa v. Perkins, 4 Otto, 260; 4 Cent. L. J. 442; Chisholm v. Montgomery, 2 Woods, 584; Bradley v. Ballard, 55 Ill. 417. This rule has been applied in cases where there was much more reason for supposing the contract to be legal than in the case at bar, for in the case at bar the illegality is so evident that the slightest inquiry would have discovered it. Under this rule, if the persons who furnished the entertainment were suing the city of Newport for their pay for it, they could not be heard to urge in sup-

port of their claim that they had acted in good faith, being ignorant of the incapacity of the city. But if they could not be permitted to make such a plea for themselves in a suit of their own, upon what principle can the defendant be permitted to make it for their advantage in a suit to which they are not parties? We think it is very clear that he can not be permitted to do it.

Of course we regret the predicament in which the furnishers of the entertainment will find themselves in consequence of this decision. We trust, however, that their fellow-citizens will not leave them without assistance.

We direct that the injunction be made perpetual.

ACCOUNT— STATUTE OF LIMITATIONS IN EQUITY—CONSTRUCTIVE TRUST.

McKEOWN v. GUILD.

Supreme Court of Illinois.

[Filed at Ottawa, June 21, 1879.]

1. ON A BILL IN EQUITY for an accounting by an administrator of one partner against another, the statute of limitations is a bar, as in a court of law, and the mere fact that the funds in the hands of the latter may be considered a trust, and that, too, a constructive trust only, does not operate to remove the bar of the statute.

2. IN ORDER TO TAKE A CASE out of the statute of limitations, it is not sufficient that the debtor admits the account to be correct but he must go further and admit that the debt is still due and has never been paid.

SHELDON, J., delivered the opinion of the court:

This was a bill for an accounting filed by Alexander Guild, Jr., as administrator of the estate of Henry L. Curran, deceased, against Thomas Quayle and James McKeown, as joint owners and partners with Curran in the ownership and navigation of the brig Robert Burns.

The master in chancery to whom there had been a reference of the cause to take and state an account made his report stating a balance against the defendants of $2,200 59. Exceptions filed by both parties to the report were overruled and a decree for this balance was rendered against the defendants, from which they appealed to this court.

It appears that on March 25, 1867 the appellants and Curran purchased the brig, the former taking a three-fourths and the latter a one-fourth interest in the vessel. The brig was employed in the wood and lumber trade on the lakes for the seasons of 1867 and 1868 and until the 16th of Nov. 1869 when she was lost with all on board including Curran, who was then sailing her as captain. On May 13, 1870, the appellee was appointed administrator of the estate of Curran. The appellants, who had acted for the brig on shore, collecting the freight and paying the expenses, desired the appellee to state the account between them and the estate. This he declined, but recommended to them as a proper person to do it, Mr. Kohlsaat, of the firm of Smith & Kohlsaat. In accordance with this suggestion appellants carried their books of account and certain vouchers relating to the vessel, to the office of Smith & Kohlsaat, who prepared an account and a surviving partner's inventory, presenting the former in the latter part of May or first part of June, 1870, to the appellee, who said it was all wrong, and filing the inventory in the county court during said month of June. A balance of about $800 in favor of the estate was found by Kohlsaat. On May 25, 1870, appellant paid to appellee $800, which the latter receipted for as being to apply on money in appellant's hands, received from insurance of the brig Robert Burns, and belonging to the heirs at law of Henry L. Curran, deceased.

A suit for damages to the Robert Burns from a collision with another vessel was then pending, in which judgment was afterward rendered in favor of the Burns for $475 50, one fourth of which, $118 12 deceased's share, was paid to appellant September 6, 1870, and his receipt taken.

In November, 1872, appellee brought an action at law against appellants in the circuit court of Cook county, which involved the same subject-matter as this suit wherein a judgment against appellee by non-suit was entered July 2, 1874. The bill in this case was filed June 4th, 1875.

The statute of limitations is set up as a bar to this suit, it being that "actions on unwritten contracts expressed or implied * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Rev. Stat. 1874 p. 675 § 15. Our statute in regard to the action of account provides that such action may be sustained by one joint tenant, tenants in common or copartners, against the other or others, by one or more co-partner or co-partners against the other co-partner or co-partners to settle and adjust their co-partnership accounts, and dealings on book accounts, by and against executors and administrators in all cases in which the same might have been maintained by and against their testator or intestate. Rev. Stat. 184 p. 100. No time of limitation of such action specifically is provided, thence leaving the five years limitation above named for actions not otherwise provided for, applicable.

Story, speaking of bills for an account remarks: "In cases of this sort, where the demand is strictly of a legal nature or might be cognizable at law, courts of equity govern themselves by the same limitations as to entertaining such suits, as are prescribed by the statute of limitation in regard to suits in courts of common law in matters of account. If therefore the ordinary limitation of such suits at law be six years, courts of equity will follow the same period of limitation. In doing so they do not act, in cases of this sort (that is, in matters of concurrent jurisdiction) so much upon the ground of analogy to the statute of limitations, as positively in obedience to such statute." 1 Eq. Jur. § 529 and see Hancock v. Harper 86 Ill. 446. Tharp v. Tharp 15 Vt. 105.

The entire account here involved had accrued previously to May 25, 1870. No transaction on

the general account has since occured. The present suit was instituted more than five years afterwards. So far as we can see the bar of this statute of limitations set up must be held to be a good defense. The same subject matter of the demand here might have been made the subject of an action at law to wit: an action of account, and where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar with the former. Kane v. Bloodgood, 7 Johns. Ch. 117.]

There are but two answers made by appellee against the allowance of the bar of the statute.

1. That as surviving partners in possession of the partnership assets the appellants occupied the position of trustees, citing King v. Hamilton 16 Ill. 190; and Nelson v. Hayner, 66 Ill. 487; and that the statute of limitations does not apply in cases of trust.

In Albretch v. Wolf, 58 Ill. 186, this court held the following language: "In Farman v. Brooks, 9 Pick. 213, it was held that the statute of limitation does not apply to direct trusts created by deed or will, and perhaps not to those created by appointment of law, such as executorships and administrations, but constructive trusts resulting from partnerships, agencies and the like are subject to the statute. The doctrine of that case is supported by good authority. Walker v. Walker, 16 Sergt. & Rawle, 379. Kane v. Bloodgood, 7 Johns. Ch. 98. Merwin v. Titsworth, 18 B. Mon. 582." Wilheim v. Caylor, 32 Md. 151, is an authority to the point, that the rule with respect to the bar of the statute of limitations is equally applicable in the case of a bill for an account by one partner against another, as in other cases of a bill for an account. See Weisman v. Smith, 6 Jones Eq.. 124.

The trust here claimed we regard as but a constructive trust and so subject to the statute of limitations, and even were it a case of proper trust, which would be within the application of the statute, we would be inclined to consider that the accounting with the appellee and the payment made to him on May 25, 1870, was an abandonment by appellants of their fiduciary character; that their relationship thereby became adverse and that the statute from that time would begin to run. Albretch v. Wolf, Hancock v. Harper, *supra*, Ang. on Lim. §174. The account made out and presented by appellants or their attorney to appellee, although not assented to by the latter, purported to be a full statement of the account between appellants and Curran, showing a balance of about $800 to be due the estate of the latter, to be a statement of the whole amount due from appellants and was equivalant to an open denial that anything more was due. The payment by appellants to appellee of $800, May 25, 1870, though not so stated in the receipt, is reasonably to be taken as having been made by appellants on their part as and for the balance due from them as found by the account rendered. This would seem to amount to an open denial or repudiation of the trust which required appellee to act as upon an asserted adverse right.

2. It is next claimed that even if the statute does apply here, the payment made by appellants of $118.12 on the 6th of September, 1870, takes the case out of the statute. We do not see that this was such a payment within the five years as would draw the general account after it, because the general account since May 25, 1870, was no longer admitted by appellants to be an open and current account, but they had rendered an account stating the balance due which they had paid and which was in the full adjustment of it, as may be supposed to have been claimed by them. The collision suit for damages to the Robert Burns was pending at the time of the payment made May 25, 1870, judgment in which was afterward rendered in favor of the Burns, and this payment of $118 12 was the one-fourth part of that judgment. The payment was not in the general account, but was specifically appropriated by both parties to the claim growing out of the collision suit, and it is not perceived how this can be construed into an admission of anything with respect to the general account, much less as a promise to pay. In order to take a case out of the statute of limitation there must be a promise to pay, the debt. It is not sufficient that the debtor admitted the account to be correct etc., but he must have gone further and admitted that the debt was still due and had never been paid. Ayers v. Richards, 12 Ill. 146; Wachter v. Albee 80 Ill 47. Holding the plea to be a bar to the suit, the decree will be reversed and the cause remanded for further proceedings in conformity to this opinion.

Decree reversed.

APPLICATION BY BANK OF DEPOSITOR'S ACCOUNT TO PAYMENT OF HIS NOTES—RIGHTS OF SURETY.

NATIONAL MAHAIWE BANK v. PECK.

Supreme Judicial Court of Massachusetts, September Term, 1878.

A promissory note, upon which the defendant was surety, was given by a depositor who kept an ordinary account with the plaintiff bank, and who was treasurer of the town of E, to the plaintiff, and plaintiff gave said depositor for said note a draft to be used for the payment of a tax due from the town. Said note, and the proceeds of it, were not made a part of said depositor's account with the bank, and the bank regarded said note as an official or town matter. When said note fell due, there stood to the credit of said depositor, as his balance account, a sum less than the amount of said note. At and ever since the maturity of said note, the plaintiff held another note for a larger amount, made by said depositor, and upon the maturity of the latter note, the president of the bank instructed the cashier to apply said balance upon the latter note. Thereafter the defendant brought to the bank a check of said depositor, made after the maturity of said last-mentioned note, and a sum of money, and tendered the same in payment of said first-mentioned note, but the cashier declined to

receive the same, because he had been directed to apply said balance on said other note. In a suit against said surety on said first-mentioned note: *Held*, that he was not entitled to have said balance of account applied to the satisfaction of the note in suit.

This case was tried without a jury. The court found the facts to be as follows: The action is brought against the defendant as indorser of a promissory note for $500, made by Joseph A. Benjamin, and all things necessary to hold defendant as indorser were done at the maturity of the note on February 15. 1876. On said February 15, and ever since, said bank held a note, which it had discounted, made by the said Joseph A. Benjamin, a copy of which is as follows:

$1,500. So. Egremont, Nov. 13, 1875.

Three months after date I promise to pay to the order of E. Elmore Callender fifteen hundred dollars at the National Mahaiwe Bank, Gt. Barrington, value received. JOS. A. BENJAMIN.

And indorsed in blank by said Callender.

The said Benjamin kept an ordinary account with plaintiff bank. At the time of giving the note in suit, Benjamin was treasurer of the town of Egremont, and plaintiff gave Benjamin for the note a draft to be used for the payment of a tax due from the town. The note and the proceeds of it were not made a part of Benjamin's account with the bank, and the bank regarded the note as an official or town matter.

When the note in suit fell due on February 15, 1876, there stood to the credit of said Benjaman as his balance of account the sum of $381.10, and the same continued to remain so standing on the books of the bank until about six weeks before the trial.

On February 16, 1876, the day of the maturity of the $1,500 note, Mr. Dodge, the president of the bank and its principal financial manager, during business hours told the cashier if the $381.10 standing to Beniamin's credit was not checked out by him before the close of business hours, to apply it on the $1,500 note before mentioned. At the close of the bank for that day it was found that Benjamin had drawn no checks on said balance, and he then again directed the cashier to apply it on the said $1,500 note.

On February 19, 1876, the defendant brought to the bank a check of Benjamin's made and handed to defendant on that day, but bearing date February 15, 1876, a copy of which is as follows:

South Egremont, Mass., Feb. 15, 1876.

National Mahaive Bank pay to the order of J. A. B., Treas., note 15 inst., three hundred and eighty-one dollars, $381.

JOSEPH A. BENJAMIN.

Defendant also had at the same time one hundred and twenty dollars in money which had been furnished him by said Benjamin at the same time with the check, and defendant acting at Benjamin's request on said February 19, during business hours tendered to the cashier of the bank said check and $120 in money in payment of the note in suit, and demanded the note. The cashier declined to receive the check and money, and told defendant he could not accept the check because he had been directed to apply the balance o Benjamin's account on another claim held by the bank, meaning the $1,500 note. After this refusal the cashier did, at defendant's request, receive the $120 and indorse the same on the note in suit, it being at the same time understood that neither party intended thereby to waive his rights in reference to the check.

The $120 have been retained by the bank. About six weeks ago th> $381.10 were indorsed on the $1,500 note as of February 16, 1876. It is not the practice of the bank to charge over due notes held by it to the account of a depositor until he has sufficient credits to pay the note. It did not appear that defendant informed the cashier or plaintiff bank on February 19 aforesaid, that the $120 was Benjamin's money. The said Benjamin became a bankrupt in the spring of 1876, and died in July or August of that year. The amount which the plaintiff is entitled to recover, if at all, is $435.10, if judgment were rendered at the present term.

The court ruled and found for the defendant, and reported the questions raised for the determination of the Supreme Judicial Court. If said ruling is correct, judgment is to be entered for the defendant; but if the plaintiff is entitled to recover, judgment is to be entered for the plaintiff for said sum of $380 and interest from February 16, 1876, to time of judgment.

M. Wilcox for defendant. *J. Dewey* for plaintiff.

GRAY, C. J., delivered the opinion of the court;

Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien; but it becomes the absolute property of the bank and the bank is merly a debtor to the depositor in an equal amount. Foley v. Hill, 1 Phillips 399, 2 H. L. Cas. 28; Bank of Republic v. Millard, 10 Wall. 152; Carr v. Nat. Security Bank, 107 Mass. 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterward insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right, which a security on an independent debt from him to the bank can avail himself by way of subrogation, as in Baker v. Briggs, 8 Pick. 182, and American Bank v. Baker, 4 Met. 164, cited for the defendent; that the right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement, or appropriation, will be required by the law to be so made as to benefit the surety. Glazier v. Douglas, 32 Conn.

39; Field v. Holland, 6 Cranch, 828; Brewer v. Knapp, 1 Pick. 333; Upham v. Lefevre, 12 Met. 174; Bank of Bengal v. Radakissen Mitter, 4 Moore P. C. 140, 162.

It is accordingly well settled that when moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; and when by express agreement or by a course of dealing between the depositor and the banker, a note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of such note or bond, even for the benefit of a surety thereon, except at the election of the banker. Clayton's Case, 3 Merid. 572, 610; Bodenham v. Purchas, 2 B. & Ald. 39, 45; Simpson v. Ingraham, 2 B. & C. 65; s. c. 3 D. & R. 249; Pemberton v. Oakes, 4 Russ. 154, 168; Pease v. Hirst, 10 B. & C. 122; s. c., 5 Man. v. Ryl. 88; Heumker v. Wigg, Dar. & Min. 160, 171; s. c., 4 Q. B. 792, 795; Strong v. Foster, 17 C. B. 201; Martin v. Mechanics Bank, 6. Har. & Johns. 235, 244; State v. Armstrong, 4 Dev. 519; Commercial Bank v. Hughes, 17 Wend. 94; Allen v. Culver, 3 Denio, 284, 291 Newburg Bank v. Smith, 66 N. Y. 271; Voss v. German American Bank, 83 Ill. 599. In the decision in McDowell v. Bank of Wilmington and Brandywine, 1 Harring. (Del.) 369, and in the *dicta* in Dawson v. Real Estate Bank, 5 Ark. 283, 298, cited for the defendent, this distinction was overlooked or disregarded.

In many of the cases indeed, the money appears to have been deposited after the debt to the bank matured, so that the case was analogous to the ordinary one of a payment, which, not being appropriated by the debtor, might be appropriated by the creditor. But where the balance of account is in favor of the depositor when his debt to the bank becomes payable, it is a case of mutual debts and credits, which except in proceedings in bankruptcy or insolvency, neither the depositor nor his surety has the right to require to be set off against each other. Judge Lowell in allowing money on deposit to the credit of a bankrupt to be set off in bankruptcy against the aggregate debt due from him to the bank, said: "This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor." *In re* North, 16 Bank. Reg. 420. See also Denman v. Boylston Bank, 5 Cush. 194; Strong v. Foster, 17 C. B. 217.

In Strong v. Foster a depositor gave to his bankers a promissory note with a surety, which was not entered in his general banking account; and it was held that the surety, when sued by the banker on the note, could not set up either as payment or equitable defence that shortly after it matured the balance of account was in favor of the depositor to a greater amount, and the plaintiff did not apply that balance in discharge of the note, or inform the defendant for three years that the note remained unpaid. But the reasoning of the court applies equally whether the balance in favor of the depositor exists at the time when his debt becomes payable, or is created by subsequent deposits. Chief Justice Jervis said: "Here the note was never entered in the account at all; the rule as to adjusting balances, therefore, does not apply. It would be essentially altering the position of the parties to establish that, because a banker who holds a note of a third person for a customer, has a balance in his hands in the customer's favor at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety. There is no authority in equity for any such position, and none certainly in law." 17 C. B. 216, 217. And Mr. Justice Willes observed: "As to what was said on the part of the defendant that, if a set-off arises between the creditor and the principal debtor, the liability of the surety on the note is extinguished; that doctrine would lead to singular results. These securities are often given to increase credits of bankers to their customers. If the liability of the maker were to depend upon the state of the customer's account at any one moment, he might never undergo the liability contemplated at all. The security is given without any reference to the other side of the account. This is the first time, I believe, that it has ever been suggested that when a note given under circumstances like these falls due, and there is a balance in favor of the customer at the time, that balance must of necessity be applied to the discharge of the note. Where the security is passed into the account, of course, it follows the rule in Bodenham v. Purchas and that class of cases." 17 C. B. 224.

In the case at bar it appears that the consideration received by Benjamin from the plaintiff bank for the note in suit was to be used by him in his official capacity as town treasurer, and that the note was regarded by the bank as an official or town matter; and neither the note nor its consideration was ever made part of his general banking account; and that when the check in favor of the defendant was drawn by Benjamin and presented at the bank, the bank held the personal note of Benjamin, exceeding in amount the balance of account in his favor at the time. Under these circumstances neither Benjamin, the maker, nor the defendant, the indorser, has the right to insist that this balance of account should be applied to the satisfaction of the note in suit, rather than of the other note of Benjamin, and according to the terms of the report, there must be judgment for the plaintiff.

A provision in a building contract that the contractor should not, without the written consent of the owner, assign any of the moneys payable thereunder, under penalty of forfeiture, etc., is for the benefit and protection of the owner alone, against the dereliction or insolvency of the contractor, and if an instalment of the moneys not yet due be assigned to materialmen, and notice thereof given to the owner without his exception, subsequent creditors of the contractor can derive no advantage therefrom.—*Burnett v. Jersey City.* New Jersey Court of Chancery.

SPECIAL CHARTERS — CONSTITUTIONAL LAW—COMMON HIGHWAY.

STATE v. LAWRENCE BRIDGE CO.

Supreme Court of Kansas.

[Filed Sept. 24, 1879.]

1. THE CORPORATION KNOWN AS THE LAWRENCE BRIDGE COMPANY, organized under an act of the territory of Kansas, approved February 9th, 1858, and the acts amendatory thereto, with the exclusive right and privilege of building and maintaining a bridge across the Kansas river at the city of Lawrence, was dissolved in twenty-one years from said February 9th, 1858, by expiration of the time limited for its continuance by the special statute under which it was created.

2. THE PROVISIONS OF SECTION 25, chapter 23, General Statutes, are invalid and void, so far as they attempt to authorize corporations organized under special acts of the territory of Kansas, to continue in the enjoyment and exercise of the powers, privileges and franchises, conferred on them by their special acts of incorporation, without any limitation as to time, as in conflict with section 1 of article 12 of the State Constitution.

3. IN 1863 THE LAWRENCE BRIDGE COMPANY constructed a bridge over the Kansas river at the city of Lawrence, for the convenience of the public, in the hope of profit to be derived from tolls as authorized by its special charter. Since 1863, the bridge has been used as a thoroughfare uninterruptedly and without molestation, except tolls have been demanded and taken from all persons crossing the bridge. The corporation had no property in the approaches to the bridge, nor in any of the lands on which it was built. The bridge is an immovable structure and an extension of the highway over the Kansas river. *Held*, that the bridge is a public highway. When the corporation expired by limitation, its franchise or license to demand or take tolls also expired, and the free use of said common highway is in the public.

Original proceedings in *quo warranto*; *J. W. Greene* and *J. P. Usher* for the State; *Clough & Wheat* and *G. J. Barker* for defendants.

HORTON, C. J. delivered the opinion of the court:

This is an action in the nature of *quo warranto*, brought originally in this court by the State of Kansas *ex rel.* James W. Green, county attorney of Douglass county, as plaintiff, charging C. W. Babcock, and his associates, with wrongfully assuming to exercise corporate rights as the Lawrence Bridge Company, and with claiming and using, without any lawful warrant, grant, or charter, the liberties, privileges and franchises of having and maintaining a bridge over and across the Kansas River, at the City of Lawrence, and of asking, demanding and taking certain tolls and duties of and from persons crossing, passing over and using the bridge. The petition also alleges that the bridge is a highway across the river at Lawrence, and the only means accessible to the public of crossing the river for many miles on either side of the bridge.

The plaintiff asks that the defendants be enjoined perpetually from exercising corporate rights as the Lawrence Bridge Company; from demanding or receiving tolls; from obstructing or removing the bridge or highway and from all interference therewith. To the petition of plaintiff the defendants pleaded that by the act of the late governor and legislative assembly of the Territory of Kansas, entitled "An Act to Incorporate the Lawrence Bridge Company," approved February 9, 1858, the exclusive right and privilege of building and maintaining a bridge across the Kansas River at the City of Lawrence, was granted for the period of twenty-one years to defendant, C. W. Babcock and others, or their assigns and such other persons as might be associated with them for that purpose; that they and their associates, or a majority of them, were authorized to form a company to be known as the Lawrence Bridge Company, with a capital stock of $375,000, in shares of $100 each; that power was given by that act to prescribe by-laws for the regulation of the company, and receive and collect subscriptions to such capital stock, establish and collect tolls for crossing the bridge; that under said act and certain amendatory acts thereto, C. W. Babcock and his associates duly organized the Lawrence Bridge Company, and before Oct. 1, 1863, constructed and completed the bridge across the river at Lawrence, at the cost and expense of $75,000, and have ever since maintained and been in possession of it; that to continue and perpetuate the existence of the Lawrence Bridge Company, with all the privileges and franchises conferred on it by the provisions of the said act of incorporation of 1858 and acts amendatory thereto, the corporation, on February 8th, 1879, by a vote of its board of directers accepted all the provisions of the act of the legislature of the State entitled "An Act Concerning Private Corporations." approved February 29, 1868, and all acts of the legislature of the State amendatory to that act, applicable to the exclusive right and privilege of building or maintaining a toll bridge across the Kansas River at Lawrence and the collection of tolls, but said corporation did not abandon by such acceptance any privilege or franchise conferred in its acts of incorporation, consistent with the provisions of the general incorporation act of 1868, and that, therefore, by virtue of section 25, of said general incorporation act of February 29th 1868, Gen. Stat. 196-7, and by the filing of the certificate of acceptance, the bridge company from February 8th, 1879, has had the exclusive right to carry out its objects, as described in the special acts of its incorporation, without any limitation as to time, and is still the owner of the bridge, with all its original franchises and privileges, including the franchise of being a corporation and the taking of tolls. Some other matters are stated in the answer, but it is unnecessary to refer more fully to it.

The twenty-one years given by the special act of February 9th, 1858, incorporating the Lawrence Bridge Company, within which it had the right to build and maintain a bridge across the Kansas

River at Lawrence and collect tolls on such bridge, expired before the commencement of the suit; hence, the first and important question which is presented for our consideration is, whether this company was continued and perpetuated as an incorporation for all time, with all the privileges and franchises originally conferred under its special charter of February 8th, 1858 and the amendments thereto, by the action of its board of directors accepting on February 8th, 1879 certain provisions of the general acts of 1868 concerning private corporations, and forthwith filing a copy of such acceptance with the secretary of State? This inquiry leads to an examination of section 25, chapter 23, Gen. Stat. and necessarily compels us to pass upon the validity of so much of that section as attempts to authorize corporations, organized under special laws of the Territory, to continue to enjoy and exercise all their powers, privileges and franchises originally conferred, for an indefinite period, beyond the limit of their chartered existence.

Before the adoption of the Constitution, the practice was to create corporations by special laws. This practice resulted in partial, vicious and dangerous legislation. To correct this existing evil and inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such laws applicable to all parts of the State, and thereby securing the vigilance and attention of its whole representation; and, finally, of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class, (Atkinson v. Railroad Compay, 15 Ohio St. 21,) it was ordained by section 1, article 22 of the Constitution that, "the legislature shall pass no special act conferring corporate powers; that corporations may be created under general laws, but all such laws may be amended or repealed." These provisions are clear and explicit. They are a limitation upon the legislative powers of the State. Any act expressly violative of these provisions would be void, and the well recognized rule that what may not be done directly can not be done indirectly, is as applicable here as elsewhere. Constitutional provisions would be of little value if they could be evaded by a mere change of form. We may look, therefore, to the substance, purpose and effect of said section 25 in determining its true character.

While the corporation act of chapter 23. Gen. Stat. purports to be a law of a general nature, having a uniform operation throughout the State, section 25 thereof occupies an anomalous position. It is *sui generis*. It is virtually separate and distinct from the other provisions of the chapter, and entirely independent. That it attempts to confer corporate powers is conceded; if sustained at all it must be on the basis that it is a general law within the meaning of article 12 of the Constitution. Yet this section if effective confers corporate powers, which are special to separate corporations, chartered by special acts of the Territory of Kansas, and which powers are not granted to any other corporation, and no other corporation can come into its class, or obtain its privileges and immunities. No corporation organized under the other provisions of the general corporation law can obtain the powers and franchises attempted to be granted to territorial corporations by this section. It may be fittingly described as an omnibus act, loaded to overflowing with special charters, some good, others bad and many vicious, and each of these charters, which is sought to be continued by this act, confers corporate powers and privileges distinct, exclusive and separate from every other corporation, and these powers and privileges do not belong or attach to all corporations of the same class; nor can all corporations of the same class upon the same terms, enjoy like powers and privileges. It is too palpable for argument, that article 12, is a sure and perfect impediment to the adoption by the legislature of a special act confering corporate powers. If it may obstruct the passage of one such act, is it not equally as effective to resist the passage of a score or more acts of like character, notwithstanding the attempt is made, as by section 25, to give them existence and vitality, under the form of a general law? Legislation of the class attempted in section 25 is most harmful. If sustained, it fritters away section 1, of article 12, defeats the object of its provisions and permits the abuses it was intended to prevent. If sustained, corporations can again be created, or extended in their existence all over the State, with just such powers and privilges, as the territorial legislature may have conferred by special charters at its pleasure or caprice, at a time when its power was unrestricted by any such wholesome constitutional provision as is imposed by section 1, article 12 on the legislative power of the State. If sustained, the legislature can go a step farther and provide that all corporations created with special powers and privileges by special charters during the territorial years of Kansas, whether organized or not, and whether in existence or not, may at once be rehabilitated with all their original powers and franchises. Under our construction of said section 25, we do not think it can be denominated a general law in the sense these words are used in article 12. It directs us to special acts and charters and attempts to continue them in existence. It does not in itself enumerate the powers of the corporations, but these powers are enumerated in the various special acts to which we are directed by it; it is therefore a plain evasion of the provisions of said article 12, and fails to be a legal enactment. It had no power to continue the Lawrence Bridge Company in the enjoyment of the exclusive rights, privileges ond franchases granted by the charter of that company. Said corporation ceased on February 8th, 1879; it was then dissolved with all the consequences of a dissolution.

To prevent any misconception of this opinion, we add that said section 25 does not fail to be a general law merely because it does not operate alike upon all citizens or corporations of the State, for many of our laws fail to do that. Take the case of the general laws for the incorporation of cities. By these laws, certain rights, powers and privileges are conferred upon cities of the first class, of which there is but one in the State; certain other

and different powers and privileges are conferred upon cities of the second class, and still different and less upon cities of the third class. Yet in these various laws, every city which is brought within the relations and circumstances provided for, is affected by the law; these acts do not grant to any city powers and privileges which upon the same terms, do not equally belong to every other city. Whenever a city comes into any class, it has all the powers and privileges that have been granted by the statute to any other city of that class. Thus, when a city of the second class has more than fifteen thousand inhabitants, it obtains and enjoys all the powers and privileges of a city of the first class. So, when a city of the third class attains a population of more than two thousand it may possess the powers and privileges of a city of the second class. Again, when a city of the first class loses its population until it becomes a city of the second class, it takes the powers of a city of that class, so, likewise, when a city of the second class, has only inhabitants sufficient to constitute it a city of the third class, it falls back to a city of the third class. The enforcement of said section 25, would give no like results. The corporate powers it seeks to confer are special and exclusive. Corporations are not permitted by it to be on an equality nor enjoy powers, upon the same terms, as belong to other corporations. There is a wide distinction between such an act as section 25, and the act incorporating cities of the first class, and other similar acts, which have often been held valid by this court.

In view of the inability of the Lawrence Bridge Company to prolong its corporate existence by virtue of the unconstitutional provisions of section 25 of the general incorporation act of 1868, and its legal dissolution on February 8th, 1879 by expiration of the time limited for its continuance by the special act under which it was created, it is important for us to determine what became of the bridge, when the franchises of the corporation ceased by limitation. The evidence shows it was completed in the fall of 1863, more than fifteen years ago; that neither the corporation nor any of the corporators ever owned any fee in any of the lands on which it was built, or ever leased any real estate on which it was constructed and maintained; that the approach to it on the south side was from the end of Massachusetts street across the levee: (a plat of ground reserved to the public in laying out the city of Lawrence:) to the south end of the bridge, and on the north side from Bridge Street across a lot, belonging to one Sarcoxie, to the north end of the bridge; that it was an immovable structure or extension of the highway over and across the Kansas River; that it was constructed for the convenience of the public, in the hope of profit to the corporation having the franchise, to be derived from tolls; and since 1863 has been used by the public as a thoroughfare up to the time of bringing this suit, uninterruptedly and without molestation, except as to the taking of the tolls. Under these facts, the bridge was unquestionably a public highway. The corporation lived its time out on February 8th, 1879. Its franchise to demand and accept tolls then ceased. Thereafter, the free use of such public highway was in the people. They have now the same right to its use, as they have to the use of Massachusetts street, or Bridge street, or any other public highway of Douglas County. We do not rest this decision upon the basis that the Kansas River is a navigable stream, and therefore a common highway, and the bridge a part of such highway, although a strong argument can be formulated that in this case the river might be treated as navigable, as the charter giving the bridge company life assumed that river was navigable, and expressly required of that corporation the construction of its bridge over the water in such a manner as not to prevent the navigation of the river by steamboats, and from the additional fact that up to 1860, the river was used to some extent for the purposes of navigation, But waiving the question of the navigability of the Kansas River, the Lawrence Bridge Company by the manner of constructing the bridge and opening it for use, and having it used for fifteen years as a part of the highway or an extension of the highway over and across the river, on payment of tolls. dedicated it to the public as fully and completely as it could have been by a deed of dedication acknowledged and recorded. When the license to take tolls expired, the public took the bridge disburdened of tolls, Craig v. People, 47, Ill. 487; State v. Lake, 8 Nev. 276; Central Bridge Corporation v. Lowell, 15. Gray, 106; Thompson v. Matthews, 2 Edw. Ch. 212.

There is no hardship in this result. Toll roads or turnpikes and plank roads, constructed under public authority for public use by incorporated companies, with provisions in the acts of incorporation for their management, are common highways; the only difference between them and other common highways is that instead of being made at the public expense in the first instance, they are authorized and laid out by public authority, and made at the expense of individuals or corporations in the first instance, and the cost of construction and maintenance is reimbursed by tolls, levied by public authority for the purpose. Angell on Highways sections 8, 9 and 14. By analogy, considering the manner the bridge in controversy was built, its situation and use, it bears a close relation to toll and plank roads. In this case, the bridge company has received tolls for over fifteen years and located as the bridge has been at a point of great travel and business interests generally, it is very probable that the tolls have been more than sufficient to repay the cost of its construction and maintenance. At least, we may assume that this was the hope of the corporators in accepting the provisions of the charter, and in constructing the bridge; and we cannot believe they have been the unfortunate victims of a harsh contract. If not, no injustice is sustained by them, that the bridge on the expiration of their franchise or license to take tolls becomes free to the use of every citizen as other public highways. If the claim of defendants was valid, that the bridge itself was the private property of the stockholders to be hereafter managed by them, or through their trustees, then, the expiration of the charter of the corporation would be beneficial, rather than injurious to them, for it would eman-

cipate the bridge from the control of the law, and convert the limited privileges of the stockholders into a broad unbounded license. We do not mean that it could not be ultimately taken and condemned for a highway, if it was needed, but unless so taken and condemned, they could use it, as other people use their own; run it on their own account; charge what tolls they pleased; close it up or open it when they thought proper, and disregard every interest except their own. This claim of counsel overlooks the fact that the bridge was constructed under authority obtained from the public on property not owned by the company and that the public have already paid for it by tolls levied by public authority. In this condition of affairs the public have rights in the continuance of the bridge or highway in its present position. Under section 42, chapter 23, Gen. Stat., the officers or manager of the late corporation have full authority to settle the business of the corporation and divide the moneys and other property among the stockholders. But the bridge, being an extension of the highway over the Kansas River and a part of the public highway, is not the property of the stockholders of the late corporation, but is a public road which every citizen has the right to use. The period during which it was lawful for the corporation to take tolls has long since expired and now neither the officers, managers, nor stockholders of said corporation have any further control over the bridge or highway. They can not obstruct it, or collect tolls, or remove or otherwise interfere with it.

The injunction prayed for in the petition of plaintiff will be granted, and such injunction will be made perpetual. Costs are also adjudged against the defendants.

VALENTINE, J.:

I concur with the chief justice in the *first* and *second* propositions stated in the *syllabus* of this case. I have no doubt concerning the unconstitutionality of section 25 of the corporation law of 1868. Com. Laws of 1879, page 220. For while said section is in form a general law, yet, so far as it applies to this and similar cases it is, in fact, nothing but an omnibus special act attempting to confer corporate powers. With reference to the third proposition of the *syllabus*, I have such grave doubts that I do not wish to express any opinion.

BREWER, J.:

It seems to me that the grave question in this case is as to the unconstitutionality of said section 25. It certainly is in form a general law. It purports to apply not to a single corporation, but to all corporations of a particular class. A law concerning cities of the first class only applies at present to a single corporation, but as it applies to all corporations of that class it is unquestionably a general law. This section not only purports to apply to all corporations of a particular class, but does in fact apply to many corporations. It grants to all such corporations the same power, that of self perpetuation. And while the wisdom of such legislation may be doubted, yet I am not clear that it is beyond the legislative power. But my associates are clear that the section, so far as this case, at least, is concerned, is unconstitutional and therefore all charter privileges of the defendants have ceased. It seems to me to follow from this that the plaintiff is entitled to judgment, for I agree with the chief justice that the bridge is a permanent structure on the public highway, and under the authorities, when the franchise to take tolls ceases, the right of the public to use the bridge free from any burden of tolls attaches, without any right on the part of the builders to remove the structure and destroy the highway. The right to take tolls for a specified number of years was the consideration granted by the public to the defendants for the privilege of placing this improvement on the highway and the former owners have now no more right to remove the bridge than the owners of a turnpike to tear it up after the franchise to take tolls has ceased.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MINNESOTA.

[Filed October 18-22, 1879.]

APPEAL—PROHIBITION.—Where, in an ordinary action in the district court, it is alleged that the court has not jurisdiction over the person, the proper remedy is to get the decision of the court upon that question and review such decision upon an appeal from the judgment. If there be an adequate remedy by appeal, prohibition is not the proper remedy. Opinion by GILFILLAN, C. J.—*State v. District Court.*

LANDLORD AND TENANT—TITLE.—A defendant who has entered into the use and occupancy of premises under a demise or written lease from plaintiff, not under seal, by the terms of which he agrees to pay an amount of rent quarterly for a definite time, can not, after having paid the quarterly rent for a portion of the time, and while remaining in possession, lawfully refuse to make further payments as they fall due, on the sole ground that he was the owner in fee of said premises when the lease was made, and that plaintiff had no title thereto. Opinion by CORNELL, J.—*Morrison v. Bassett.*

JURISDICTION.—The municipal court act for the city of St. Paul provides that "no summons shall issue until the complaint shall be filed with the clerk," and also that each of the pleadings shall be verified. *Held*, that the want of a verification to a complaint filed with the clerk in said court is not a jurisdictional defect for which the action will be dismissed after summons issued thereon and duly served. A verification, in the ordinary use of these legal terms, forms no part of a complaint. Opinion by CORNELL, J.—*McMath v. Parsons.*

COMMON CARRIERS — LIABILITY UNDER SPECIAL AGREEMENT.—Under agreement between plaintiff and defendant companies, between whose lines of road there was a rail connection at Merriam Junction, the defendant received from plaintiff for said junction eight of its cars loaded with wheat, for transportation and delivery to consignees at Minneapolis, a point on defendant's road. By the terms of said agreement defendant was required to haul the cars over its road

having exclusive charge and control thereof, make delivery of the wheat, and then return the same either loaded or empty to the plaintiff at said junction in as good condition as when received, ordinary wear and tear excepted. Both parties were to share in the profits of the transportation of the wheat and other freight so carried, and plaintiff was to receive from defendant in addition to its share of profits, a stipulated compensation for such use of its said cars. While being so used by the defendant the cars were wholly destroyed by fire at Minneapolis, without any fault or negligence on its part, amounting to want of ordinary care. *Held*, that defendant was not liable to plaintiff for such loss, either as a common carrier, a bailee for hire or otherwise. Opinion by CORNELL, J.—*St. Paul, etc. R. Co. v. Minneapolis, etc. R. Co.*

SUPREME COURT OF KANSAS.

July Term, 1879.

[Filed October 14, 1879.]

TAX DEED—VOID ASSESSMENT.—A tax deed regular on its face, containing a perfect description of the land conveyed, and of record in the time prescribed by the statute of limitations, is protected by said statute from impeachment by evidence that the description of the land on the assessment roll and in the sale certificate is fatally defective. Reversed. Opinion by BREWER, J. VALENTINE, J., concurring. HORTON, C. J., dissenting.—*Maxon v. Huston.*

ABSOLUTE CONVEYANCE — CONDITIONAL SALE—MORTGAGE.—1. An absolute conveyance and a separate agreement to recover, though executed simultaneously and as parts of one transaction, may or may not constitute a mortgage, and equity is not concluded by the form, but will have regard to the actual facts. The test is the existence or non-existence of a debt. If after the transaction no debt remains, there is no mortgage, but only a conditional sale. 2. In such a case, evidence of the situation of the parties, the circumstances of the transaction and of any independent parol agreement, is competent. 3. Where an action of forcible entry and detainer is upon plea of title certified to the district court, it is not changed to an action for the recovery of real property, and a second trial is not a matter of right. Affirmed. Opinion by BREWER, J. All the justices concurring.—*McNamara v. Colvin.*

COMMON CARRIER— FREIGHT CHARGES—LIEN.—A shipper shipped goods from Roselle, Ill., a station on the Chicago & Pacific Railroad, to Girard, Kas. An agent on that road received the goods at Roselle, took from the shipper what he said would pay the freight charges through, and gave him a receipt upon which was indorsed "freight charges paid through to Girard." The Missouri, Ft. Scott & Gulf Railroad received the goods at Kansas City without any knowledge or notice of the action of the agent at Roselle or of the receipt given by him and carried them over its road to Girard. Only a portion of its charges therefor were paid. The agent at Roselle had no authority from the Gulf road, nor did he pretend to have any. No agreement or arrangement of any kind existed between the roads in reference to shipments of freights or contracts therefor. *Held*, that the Gulf road had a lien upon the goods for its unpaid charges. Reversed. Opinion by BREWER, J. All the justices concurring. —*Wolf v. Hough.*

FRAUDULENT CONVEYANCE — DEFAULT — PRACTICE.—1. A conveyance may be void as against a subsequent creditor if made with a specific intent to defraud such creditor. 2. Ordinarily mere generality of statement in a petition is to be cured by motion and not by demurrer, and where all essential facts are stated though in general terms, the demurrer will not lie. 3. Where judgment is rendered by default against a party, the court may properly overrule a motion to set aside the judgment, unless it appears not only that the default is excusable, but also that the answer tendered is true. Affirmed. Opinion by BREWER, J. All the justices concurring.—*McPherson v. Kingsbaker.*

NON-USER OF CORPORATE POWERS—STATUTE OF LIMITATIONS.—1. A mere non-user of all corporate powers is not a concealment of the corporation such as to suspend the running of the statute of limitations. 2. Under the general incorporation law of 1866, a failure to elect a successor did not, in the absence of some restrictive provision in the by-laws, vacate the office of president, but the then incumbent continued as officer *de facto* so far, at least, that service upon him would bring the corporation into court. 3. The mere fact that the mayor, to whom, in conjunction with the council, is given the general management of the affairs of a city, is interested adversely to the city in a cause of action belonging to it, and a necessary party defendant in an action to enforce such cause of action, does not operate to suspend the running of the statute of limitations. 4. Where action on a note or bond is barred, it is also barred on the mortgage given solely as security therefor. Affirmed. Opinion by BREWER, J. All the justices concurring.—*City of Ft. Scott v. Schulenberg.*

RAILROAD STOCK LAW—DEMAND OF PAYMENT—EVIDENCE.— 1. Under the act of 1874, "Relating to Killing or Wounding Stock by Railroads," (Comp. Laws of 1879, pp, 784, 785), a demand must be made of the railroad company for the value of the stock killed, or for damages for injuries thereto, but this demand "may be made of any ticket agent or station agent of such railway company" (sec. 3 of said act), and the demand may be made orally and not in writing. Hence, when such a demand is made, what the agent says at the time concerning the matter may be given in evidence against the railroad company, in an action brought by the owner of the stock against the railroad company for injuries done by the company to his stock. The agent's statements, made at such time and concerning such matter, are admissions within the scope of his authority and a part of the *res gestæ*. And on the trial of the case, where a proper oral demand is first proved, and no evidence is at any time introduced tending to disprove the same, it is not material error for the court to permit the plaintiff to show by incompetent evidence that a written demand was also made. 2. A written demand, containing evidence showing what the cow (for injuries to which this suit was brought) was appraised at, was introduced in evidence by plaintiff on the trial. This evidence concerning the appraisement was incompetent; but each of the appraisers was afterwards introduced as a witness, and testified that the cow was worth $30, just the amount at which said written demand showed that the appraisers had formerly appraised her; and all the other evidence introduced in the case upon this subject tended to show that the cow was worth that amount. *Held*, that no material error was committed by the introduction of said incompetent evidence as said incompetent evidence was not substantially prejudicial to the rights of the defendant. 3. Two letters of W. F. D., general superintendent of the defendant railroad company, were introduced and read in evidence over

general objections of incompetency, irrelevancy and immateriality. The subject-matter of these letters was within the general scope of the superintendant's authority, and the contents thereof were principally admissions of facts and not merely offers to compromise. *Held*, that although a mere offer to compromise is not proper evidence; yet that an admission of a fact is, and that these letters were properly introduced in evidence. 4. A witness was permitted to testify that he "looked about and saw hair on the ties; the first tie had a lot of hair on it, and the second one not so much, and so on," as indicating that the injured cow had been pushed along the railroad track by the company's engine. *Held*, not error. Affirmed. Opinion by VALENTINE, J. All the justices concurring.—*Central Branch R. Co. v. Bateman.*

SUPREME COURT OF RHODE ISLAND.

March Term, 1879.

NEGLIGENCE — PROXIMATE AND REMOTE CAUSE.—A was injured by a horse driven by B. The horse was frightened by the overturn of a sleigh to which it was harnessed, and the overturn was caused by a heap of snow and ice wrongfully made and left in a highway by C. A sued C to recover damages. C demurred. *Held*, that the demurrer could not be sustained, the wrongful act of C being in law the proximate cause of A's injury. Opinion by DURFEE, C. J.—*Lee v. Union R. Co.*

BOUNDARIES IN CASE OF WATER LINE—HOW DETERMINED BETWEEN RIPARIAN PROPRIETORS.—1. In 1855 a harbor line was established for the west side of Providence river. The line was straight, except that it made a slight turn easterly and outward before striking the projecting headland of Field's Point. North of this headland was a deep indentation in the shore. On a bill in equity brought to determine the boundary from the shore to the harbor line between two riparian estates, one of which had a shore front slightly lengthened, by the curve of the shore; it appearing that many estates along the harbor line had been filled out to it and occupied, and that the harbor line was a long one: *Held*, in the circumstances of the case, that the boundary line was to be run from the termination of the upland boundary on the shore perpendicular to the harbor line. 2. *Held, further*, that the initial point of the boundary line so run was the termination on the shore of the upland boundary, however this upland boundary might have been fixed, whether by possession or by record or other title. "The complainants claim a frontage on the harbor line proportionate to their shore line. If they are so entitled, the other proprietors within the harbor line are likewise so entitled, other things being equal; and it follows that their water front can not be determined without simultaneously determining every other water front, for every front will be affected by irregularities of the shore either above or below it. For example: under the rule contended for, the proprietor of the elbow in the shore, having a long shore line, will be entitled to a long frontage which will swing the dividing line between him and the next proprietor aslant, and the result will be a corresponding obliquity on all the water fronts and dividing lines above it. And so any considerable curvature or indentation anywhere will have similar effects. The rule invoked by the complainants is a rule borrowed from a work on the civil law, which was applied by the Supreme Judicial Court of Massachusetts to the apportionment of alluvion in the bend of a innavigable river. Deerfield v. Arms, 17 Pick. 41. The rule has been approved as a rule for the apportionment of alluvion in New York and in the Supreme Court of the United States. O'Donnell v. Kelsey, 10 N. Y. 412, 415; Nott v. Thayer, 2 Bosw. 10; Johnston v. Jones, 1 Black, 209. It has also been applied, but not invariably, to the apportionment of tide-flowed flats lying in a cove or littoral recess, among the owners of the upland. Rust v. Boston Mill Corporation, 6 Pick. 158; Wonson v. Wonson, 14 Allen, 71, 85; Delaware, Lack. & West. R. Co. v. Hannon, 37 N. J. (Law,) 276. In Gray v. Deluce, 5 Cush, 9, flats lying in a shallow cove were divided among the owners of the upland by drawing parallel lines from the ends of the division lines of the upland at right angles with a base line across the mouth of the cove. This rule seems to have met with approval in Stockham v. Browning; 18 N. J. (Eq.) 391. In Atty. Gen. v. Boston Wharf Co. 12 Gray, 553, 558, the court say that, 'in general, where there are no circumstances or peculiarities in the formation of the shore or the course of the channel, the lines of division are to be made to the channel in the most direct course from the lateral boundaries of the several tracts of upland to which the flats are appended.' We are not advised that any rule has ever been laid down for a case like the one at bar. The problem here is to define water fronts in regard to a harbor line, not to divide flats or alluvion. The establishment of a harbor line, we have held, amounts to an implied permission to the riparian proprietors within it to fill out to it. The question is, how fill out to it? We answer, fill straight out to it. The owners of the upland are impliedly permitted to carry the upland forward to the harbor line so that each owner will occupy the part which is abreast his own land. There may be exceptional cases where the shore or the harbor line is so peculiar that permission to fill straight out can not be implied. Perhaps it cannot be implied at the elbow which we have mentioned in the shore, where the harbor line diverges from a direct course; if there are several estates there, it cannot. The mode of filling must be varied. But the variation ought to be limited by the necessity for it. It would be impracticable now, after so many fronts have been filled, to allow it to affect the apportionment along the whole harbor line, even if originally it would have been right and expedient. We do not perceive that it will be necessary to allow it to have any effect on the decision of the case at bar, the elbow in the shore being considerably below the estate in controversy. It follows that the dividing line between the water fronts here, in case the parties have not established one for themselves, is a line drawn from the shore end of the dividing line of the upland to the harbor line so as to intersect it at right angles. This rule is analogous to the rule laid down in Gray v. Deluce, and to the rule applied by us in Thornton v. Grant, 10 R. I. 477, 487, to the ascertainment of water fronts where no harbor line existed. It has the great recommendation of simplicity of application," Opinion by DURFEE, C. J.—*Aborn v. Smith.*

SUPREME COURT OF WISCONSIN.

September, 1879.

LIEN FOR WORK ON "LOGS AND TIMBER"—CONSTRUCTION OF "TIMBER." — 1. Ch. 154 of 1862 (Tay. Stats. 1768, § 25) in terms gives a lien for labor performed on "logs and timber," whether done for the owner or his representative or for a stranger; but it gives no lien for labor performed upon lumber; and

such a lien can only be enforced under the general statute concerning the liens of mechanics and others (R. S. 1858, ch. 153, sec. 12), which applies only to labor performed for or on account of the owner or his agent or assignee, or a sub-contractor. 2. Laths are lumber, and are not timber within the meaning of the act of 1862. 3. In this action for a lien for work performed in a county to which the act of 1862 applies, the court found that plaintiff worked for the defendant W "in sawing slabs out of logs for lath;" that a certain sum was due him for such work; and that "the logs and lath upon which said labor was performed, were then and there the property of defendants E." *Held*, that these findings do not show plaintiff entitled to a lien upon the lath as against the defendants E. 4. The constitutionality of the act of 1862, or of the provisions thereof of giving justices of the peace jurisdiction of actions to enforce the liens there provided for, not here considered. Opinion by LYON, J.—*Babka v. Eldred.*

PARTNERSHIP—ACCOUNTING—INTEREST—APPLICATION OF MAXIM OMNIA PRÆSUMUNTER CONTRA SPOLIATOREM.—1. In an action by D for the dissolution of a firm consisting of four members it was error to determine the rights and liabilities as between themselves of two members of the firm, growing out of the relations as partners in another firm, consisting of those two only. 2. The maxim *omnia præsumunter contra spoliatorem*, applied to a defendant who, being employed upon a salary to keep the books of the firm of which he was a member, kept them in such a manner as to render it impossible to determine correctly the state of the accounts between the partners. 3. It appearing, in such a case, that goods sold by weight or measure were taken from the store to be used in said defendant's family, without having been weighed or measured, and that the accounts as shown by the books could therefore not be relied upon as accurate in that respect, the referee for trial did not err in resorting to other sources of information in order to get at the real amount and value of goods so used. 4. While it is the general rule that one partner is not chargeable with interest on moneys of the firm in his hands, until a balance has been struck or an accounting had (Marsh v. Frasier, 37 Wis. 149; Yates v. Shepardson, 30 Id. 173, yet, where one partner kept the account books, and knew, or ought to have known, the precise amount in his hands belonging to the firm, and made at one time what purported to be a full statement of the business, which was incorrect: *Held*, that there was no error in charging him with with interest. Opinion by LYON, J.—*Diamond v. Henderson.*

CONDEMNATION OF LAND—DAMAGES—MODE OF COMPUTING.—1. It is *res adjudicata* in this case (43 Wis. 183), that plaintiff is entitled to recover all the damages he had sustained up to the commencement of the action, from defendant's trespass in constructing, maintaining and operating its railroad on his land in a public street (only six inches in width of the track being upon said land), and that the fact that a part of the road was at the same time constructed and operated upon adjoining lands not owned by the plaintiff, can not be considered for the purpose of lessening the damages. 2. Under the Constitution and laws of this State where lands are legally taken for the purpose of building and operating a railroad thereupon, the "just compensation" which the railroad company is required to pay, includes "the value of the lands actually taken, and the damages sustained by the owner by reason of the taking thereof" for such purpose; and the fact that the value of the owner's other lands, adjoining those taken, and used in connection with them, would be diminished by the proximity of the road, if it were built close to but not upon his land, can not be considered for the purpose of lessening the damages; and an equally liberal rule in favor of the land-owners applies in case of a trespass by an illegal taking for the same purpose. 3. The court below having improperly permitted questions to be propounded to the jury (for special verdict) by which they were required to state, not only the gross amount of plaintiff's damages, but the several items composing it, and having twice sent them out to re-consider their verdict in consequence of inconsistencies in the answers, and the jury having made successive material changes in their assessments with no apparent reason except to make the general and special assessments consistent, this court holds that there was an abuse of the statutory right to a special verdict, and reverses the judgment for a new trial on that ground. Opinion by TAYLOR, J.—*Blesch v. Chicago &c. R. Co.*

SUPREME COURT OF INDIANA.

[Filed October, 1879.]

SPECIAL AND GENERAL VERDICT — INCONSISTENCY BETWEEN. — Suit by appellant against appellee upon a promissory note. The complaint alleged that Samuel Harlow, who is a son of Garret Harlow, was engaged in certain business and was accustomed to use and sign the name of his father in contracts relating to his said business, his father agreeing that he might so use his name and credit; that Samuel borrowed of the plaintiff $600, to be used in his said business, and executed the joint note of himself and father therefor; that the said Garret had acknowledged the note to have been executed with authority and had ratified the act of his son. This suit was to recover a balance due upon the note. Samuel Harlow made default, and judgment was rendered against him. Garrett answered in general denial, and on the trial a general verdict was rendered in his favor. The jury also answered the following interrogatory as follows: "Did the plaintiff read in evidence to the jury a note purporting to be signed by Samuel Harlow and Garret Harlow, a copy of which is filed with the complaint?" Answer: "Yes." *Held*, that the facts stated in the complaint amounted in legal effect to an allegation that the appellee, Garret Harlow, acting by and through his son Samuel had executed the note in suit jointly with the said Samuel, and that the general denial, not being sworn to, only put in issue the existence of the note. The answer to the interrogatory was materially inconsistent with the general verdict. The fair implication from this answer was that the note set out in the complaint was in existence and had been produced upon the trial, and such note having been read in evidence, the appellant became entitled to have his damages assessed upon it, and to judgment for the amount found to be due upon such an assessment. Reversed.—*Hall v. Harlow.*

PROMISSORY NOTE — NEGLIGENCE IN SIGNING — DEFENSE AGAINST IN HANDS OF INNOCENT HOLDER.—Suit on a promissory note. Answer of *non est factum*. The evidence was heard by a jury, and the plaintiff demurred thereto, the demurrer was sustained by the court and the jury were discharged. The evidence for the defendant showed that defendant was a carpenter, whose eyesight was defective, and it was growing dusk in the evening when the note was signed, so that he could not see well to read it; that the parties who procured the execution of the note told him he would have nothing to pay unless he made the amount out of the sale of a certain arti-

cle, and that defendant relied upon this statement and signed the note without reading it. *Held*, that a party whose signature to a paper is obtained by fraud as to the character of the paper itself, and who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included. 42 Ind, 227. But where the maker of a promissory note, governed by the law merchant, is induced by the fraud of the payee to sign his name thereto, he is liable to a *bona fide* indorser for value if he was guilty of any negligence in failing to inform himself of the contents of the note; though he may not be liable to the original payee or his assignee who acquires the paper after the same has become due. The evidence in this case shows that the defendant was guilty of negligence in signing the note. Affirmed.—*Thomas v. Ruddell.*

CRIMINAL PRACTICE — CHANGE OF JUDGE.—Appellant was indicted for arson. At the September term, 1878, on account of the sickness of the presiding judge, one Porter was appointed to hold the residue of the term, and the cause was continued until the next term. At the next term, the regular judge still being ill, Mr. Porter was again appointed to hold that term of court. At that term, on proper affidavit filed, a change of judge was granted, and the case continued until the next term. At the next term of the court, the regular judge having died in the meantime, his successor, one Denbo, presided. Defendant was put upon trial, and the jury having failed to agree were discharged. Afterwards appellant moved for a change of judge upon a sufficient affidavit, but the motion was overruled on the theory that the defendant had had one change of judge on the same ground. Appellant was then tried and convicted. *Held*, that a defendant in a criminal prosecution is entitled to only one change of judges on account of bias or prejudice. But he is entitled to only one change on that ground, and the court has no discretion to refuse it. Judge Porter ordered that a change of judge be granted, and continued the cause, but neither appointed nor called any judge to try the case. Judge Denbo found the case upon the docket, and it became his duty to try it by virtue of his office. The change of judge had been ordered but not perfected, and the cause comes before Judge Denbo in precisely the same manner that it would if no change had been ordered. The court erred in refusing the change applied for. Reversed.—*Duggins v. State.*

BOOK NOTICE.

THE DOCTRINE OF DAMNUM ABSQUE INJURIA, Considered in its relations to the Law of Torts. By EDWARD P. WEEKS, Counselor at Law. San Francisco. Sumner, Whitney & Co., 1879.

Most law treatises are written for the purpose of showing the remedies which, under certain circumstances, the law will give for violations of conduct or breaches of legal duty. The book before us, on the contrary, treats of those injuries which are remediless, and which so far as courts are concerned are, in the language of the law, *damnum absque injuria*. To lawyers a work of this character must be of much value, since it is quite as important to understand the cases in which an action will *not* lie as to know the cases in which a suit *may* be entered. It is only necessary to glance at the table of cases which covers, in this volume, twenty-five pages in small type and double columns, to understand how often lawyers have advised their clients that an act was *injuria*, only to find after an expensive and tedious litigation that in the opinion of the court it was only *damnum*.

Mr. Weeks' work is written in a readable and attractive style, and will be read with interest and instruction by the profession. Its plan may be best given in his own words: "The general plan of the work is to consider the subject of *damnum absque injuria* as follows: It is true, as a general proposition, that a person has a right to be secure in his life, his person, his liberty, health, reputation and property, real and personal; and further that for a violation of this security, for an injury to any of these things, he or his representatives can recover some sort of damages. We shall consider in their order those cases of injury to these things where no damages can be recovered—where the law imputes no wrong and therefore gives no redress. The subject of injuries to real and personal property includes chapters on injuries to the holders and owners of stocks and shares in incorporated companies, coming under the general head of conversion of personal property, and the subject of injuries to real property includes a chapter on injuries from mining operations and one on interference with subterranean and surface streams and percolating waters. This is followed by a consideration of subjects which it has been found convenient to consider separately viz. injuries from nonfeasance, misfeasance, and malfeasance of public officers, the subject of injuries arising from negligence, and certain cases of misrepresentation and deceit."

QUERIES AND ANSWERS.

QUERIES.

38. DOES A RETURN INDORSED on an *alias* execution as follows: "No property found on which to levy this writ" release a levy on real estate made previously under the original execution, there having been no appraisement or advertisement of the land and the levy having been made two years before. A.

39. WILL—DEVISE—CONSTRUCTION.—In Pennsylvania, land was devised by A in this manner: "I give and devise to B and C, and to their heirs and assigns forever" (describing the real estate), "to have and to hold the same in trust to permit my wife to occupy and enjoy the same, and receive the rents and profits thereof so long as she may remain my widow. But should my wife marry again, her interest and claim in the said real estate shall cease and determine, and it shall remain in trust for the use of my child and grandchildren during their joint lives and the life of the survivor of them; and at the decease of such survivor the same shall be sold, and the proceeds of the sale divided amongst the legal representatives of my said child and grandchildren." The will was executed in 1840. The widow never married. Two grandchildren were alive at the time of the execution of the will and death of the testator—children of the testator's son, who was dead. The testator's child, a daughter, after her father's death married and had one child. No further provision was made concerning the real estate. Would the child inherit directly from the widow? By the widow not marrying, did the child and grandchildren inherit the estate discharged of the trust? Does the

child of the daughter at its birth become a joint owner with its mother and the other grandchildren, the widow having died after it was born? If the child of the daughter has a joint interest in the estate, and it should be the survivor of the two grandchildren and its mother, who will be the legal representatives referred to in will. A subscriber requests an answer to these queries, which appeared in our columns over a year ago but received no solution at the hands of our correspondents.

ANSWERS.

No. 3.

[8 Cent. L. J. 59.]

1. In those States in which the distinction between sealed and unsealed instruments is retained, a release *not under seal*, from a debt given upon payment of a part, will not constitute a valid defense to an action for the residue. 45 N. Y. 670. 2. The statutes of every State prescribe the *modus operandi* of entering satisfaction. If this be complied with it will release a defendant with a sealed or unsealed receipt. 46 N. Y. 670. 3. & 4. The release of A. discharged C. & D.; Storey on Bills 269, 270, 430, 431.

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No. 55.

[7 Cent. L. J. 179.]

This query published some time ago was as follows: "Can a parol contract between principal and agent, whereby the agent is to sell lands and sign principal's name as agent of principal, be enforced in equity, and can evidence of third parties who heard principal and agent separately ratify said parol contract be introduced." Subsequently an answer appeared citing two Minnesota cases. See 7 Cent. L. J. 199. This answer may be law in Minnesota, but not in California. By our code of civil procedure, section 1973, an agreement by an agent for the sale of lands is invalid unless his authority be in writing. The law in Minnesota may be as it was in N. Y., (10 Paige 386), requiring an agent's authority to be in writing if he makes a conveyance *in presenti*, but not when he simply enters into an agreement to convey. This was formerly the law in California. Heinlen v. Martin, Supreme Court, California, March 28, 1879. But if, as I suspect it is, the questioner lives under a code, requiring as does the California code, every authorization to be in writing, if the act to be done must be in writing, the answer must come from the rules of equity. Judge Story, in 3 Story C. C. 181 says that "the rule in equity always has been that the statute is not to be allowed as a protection to fraud, or as a means of seducing the unwary into false confidence, whereby their intentions are thwarted or their interests betrayed," and in 1 P. Wms. 618, it is said that "in cases of fraud, equity would relieve even against the words of the statute" In 21 Cal. 93 it is held that parol evidence will be admitted even against the words of the statute for the purpose of showing fraud. Finally in 1 Russ. & M. 53, equity compelled an agent, verbally employed to negotiate a purchase, who did purchase, but in his own name, to convey over to his employer, and that too, on the ground of agency. We therefore think that the query can be answered in the affirmative if the grantee is in such a position that the conveyance or contract will be a fraud upon him unless equity will enforce it.

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NOTES.

M. D. Ector, Presiding Justice of the Texas Court of Appeals, died at Tyler, on the 29th ult.——John Rodman has been appointed reporter of the Kentucky Court of Appeals, *vice* W. P. D. Bush.——Two English lawyers whose names are familiar on this side of the Atlantic died last month. The first of these, Sir Anthony Cleasby was for many years a baron of the Court of Exchequer. He was born in 1805, and called to the bar in 1831. In September 1868 he ascended the bench where he remained until last year when ill health compelled him to retire. The other, Mr. Robert Alexander Fisher, judge of the Bristol Court, was born in 1817. He practised for several years as a special pleader, and was called to the bar in 1850. He practised for many years but was best known as a legal author. He edited "Grant on the Law of Bankers," and also brought out a treatise on the Stamp Act of 1870, but his chief work is the well-known "Fisher's Digest," which was continued annually until his death.

The annual election of officers of the St. Louis Bar Association took place on Monday night last. The officers elected for the ensuing year were as follows: President, Henry Hitchcock; Vice Presidents, A. W. Slayback, G. M. Stewart, E. C. Kehr; Secretary, J. E. Withrow; Tresurer, Eugene Tittman; member of Executive Committee John W. Dryden; members of Committee on Admissions, Shepherd Barclay, Alexander Martin, H. A. Haeussler and J. D. Lawson.——If a large and powerful frame, a jolly countenance and a deep stentorian voice are the qualities which distinguish a truly British judge, the late Baron Pratt, says the *Leisure Hour*, was happy in the possession of all these endowments. He had been a good speaker at the bar in London and on the Home Circuit, with, it was said, but poor legal acquirements; but on the Bench he had the good fortune to be the junior judge in the Court of Exchequer, his seniors being Lord Chief Baron Pollock, with Barons Parke, Alderson, and Rolfe, four men of illustrious attainments, legal as well as general, whose judgments and opinions Baron Platt invariably acquisced in when presented to him, writing "I agree.—T. J. P." on the manuscript, often without opening it! "It would be presumptuous in me to differ from—or even to read, with a hope of understanding them—the judgments of such men," he was once heard to remark. Baron Platt delighted to sit in solitary granduer at *Nisi Prius*, and upon the trial of prisoners; and both these duties he performed with singular ability, his good common sense and thorough knowledge of the world often making up for the want of any niceties of legal distinction, and rendering him always a great favorite with the jury. The judge, like many others down to and including those of the present time, was very severe on witnesses who would not "speak out;" they should "lose their verdict;" he would not "allow their expenses;" he would "commit them," etc. "What are you?" roared he to a burly witness some six feet high, who spoke with a voice of a maiden of bashful fifteen. "I am a butcher, my lord," replied the witness, in a whisper. "Then if you are a butcher, man." thundered Platt, "speak like a butcher, can't you?" Baron Platt remained junior judge of his court until his retirement in 1856.